

No. 17298

**United States
Court of Appeals**
for the Ninth Circuit

CMAX, INC., also D. B. A. CITY MESSENGER
OF HOLLYWOOD and CITY MESSENGER AIR
EXPRESS,

Appellant,

vs.

DREWRY PHOTOCOLOR CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PHIL JACOBSON,

H. J. BISCHOFF,

610 South Main Street,
Los Angeles 14, California.

For Appellee:

DUNLAP, HOLMES, ROSS & WOODSON

PHILLIP S. LYDDON,

800 First Western Bank Building,
Pasadena, California.

United States District Court for Southern District
of California Central Division

Civil Action No. 1299-59 PH

CMAX, Inc., also d.b.a. City Messenger of Hollywood
and City Messenger Air Express.

Plaintiff,

vs.

DREWRY PHOTOCOLOR CORPORATION, a cor-
poration,

Defendant

COMPLAINT FOR FREIGHT
UNDERCHARGES

Comes now the Plaintiff for a first count herein
alleges and respectfully shows to the Court:

First Count

1. This action arises under the Federal Aviation Act Section 403, 49 U. S. Code Section 1373, as hereinafter more fully appears. The District Court has jurisdiction under provisions of Title 28 U. S. Code Section 1337.

2. The Plaintiff is a corporation duly organized and existing under the laws of the State of California, having its principal place of business in the County of Los Angeles, State of California. Its Articles of Incorporation were filed with the Secretary of State of California on February 19, 1951 as City Messenger of Hollywood. On April 30, 1957 it filed with the Secretary of State of California an amendment to its Articles of Incorporation changing its name to CMAX,

Inc. It transacted its business hereinafter referred to not only in its own name but also in the names of City Messenger of Hollywood and City Messenger Air Express. On October 7, 1958, it filed with the County Clerk of Los Angeles County its certificate of fictitious names, and on November 5, 1958 it filed with the County Clerk of Los Angeles County proof of publication of said certificate all as provided by Sections 2466 and 2468 of the Civil Code of California.

3. The plaintiff is an "Air Freight Forwarder" as defined in Title 14 Code of Federal Regulations Section 296.2(a) and received from the Civil Aeronautics Board a "Letter of Registration" No. 163 effective May 22, 1954, and "Operating Authorization" No. 47 effective February 25, 1957. That said authorizations have been in effect at all times herein mentioned.

4. The plaintiff is an indirect air carrier engaged in the transportation of property as an Air Freight Forwarder in interstate commerce under its authorizations hereinbefore mentioned. Heretofore and prior to the Acts, matters and transactions, hereinafter stated, in compliance with Title 49 U. S. Code Section 1373 and Code of Federal Regulations Section 221.3(a) plaintiff filed with the Civil Aeronautics Board in the District of Columbia at Washington, its printed tariffs, showing all rates and charges for air transportation between points served by it, and showing all classifications, rules, regulations, practices, and services in connection with such air transportation, and posted and published the same as prescribed by law. That said tariffs in effect during the times herein stated consisted of Rules Tariff C.A.B. No. 1, Specific Com-

modity Tariff C.A.B. No. 4, and General Commodity Tariff C.A.B. No. 5. Said General Commodity Tariff published rates which applied on all articles or commodities except items excepted under the terms of said tariff in accordance with Title 14 Section 221.4(h) Code of Federal Regulations. Said Specific Commodity Tariff published rates on specific commodities which are specifically named or described in said tariff in accordance with Title 14 Section 221.4(w) and Section 221.75 Code of Federal Regulations. Said Rules Tariff published rules and regulations governing rates published in said General Commodity Tariff and Specific Commodity Tariff.

5. During the periods hereinafter stated in paragraph 8 various shipments of commodities, referred to in said paragraph were tendered and delivered by defendant herein, to this plaintiff for transportation in interstate commerce to various destinations. Upon receipt of such shipments, plaintiff delivered to defendant instruments in writing, described as airbills showing the lading, weight, and name and address of consignee at destination. That said shipments so received by plaintiff were forwarded to destination points for the most part over lines of Direct Air Carriers as defined in Title 14 Code of Federal Regulations Section 296.1(b).

6. All of said shipments were received subject to the rules, terms, conditions and tariffs of plaintiff, herein referred to in paragraph 4.

7. That the lawful charges for the transportaton of the shipments referred to in paragraph 8 hereof are

as prescribed in Title 49 U. S. Code Sections 483 and 1373.

8. Defendant Drewry Photocolor Corporation is a corporation organized and existing under the laws of the State of California, and was at all times herein mentioned doing business in the County of Los Angeles, State of California.

That beginning with the month of January 1955 and during each succeeding month, except the month of February 1955, to and including the month of February 1957, defendant tendered and delivered various commodities to plaintiff for transportation and forwarding to various destinations in the United States as alleged in paragraph 5 herein.

That the charges of plaintiff based upon the applicable tariffs of plaintiff on file with the Civil Aeronautics Board are 28,781.85 dollars. That defendant has paid on account of services of plaintiff herein the sum of 16,085.76 dollars leaving a balance of 12,696.09 dollars due and unpaid. That interest at the rate of 7% per annum from the date the services aforesaid were performed, to and including the date of filing this complaint is 3,307.09 dollars. That no part of the balance of principal or interest aforesaid has been paid.

That prior to the commencement of this action, an itemized statement of the claim of plaintiff was delivered to the defendant.

For a second and separate count plaintiff alleges and respectfully shows to the Court:

Second Count

1. Realleges and reaffirms paragraphs numbered 1 to 8 inclusive with the same force and effect as if herein repeated and set forth.

2. That at all times herein mentioned plaintiff entered in its books of accounts its charges as shown on air bills issued by it. That the undercharges herein involved were entered in its books of account pursuant to an audit completed in the month of August 1959.

3. By reason of the aforesaid services rendered to defendant during the aforesaid period, the defendant became indebted to the plaintiff in the sum of 12,696.09 dollars upon an open book account, said sum of 12,696.09 dollars being the balance due and owing to plaintiff. That an itemized statement of said book account showing said balance due to plaintiff has been rendered to said defendant.

Wherefore, plaintiff prays judgment against the defendant in the sum of 12,696.09 dollars, together with interest thereon amounting to 16,003.18 dollars, cost of suit, and for such other and further relief as to the Court may seem proper.

PHIL JACOBSON

H. J. BISCHOFF

/s/ By H. J. BISCHOFF

Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 15, 1959.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for its answer to plaintiff's complaint in the above entitled action, admits, denies and alleges as follows:

Answer to First Count

1. Denies the allegation of paragraph 1 that this action arises under the Federal Aviation Act, Section 403, 49 U. S. C. Section 1373, and alleges that, if any claim for relief exists, it arises under the "Civil Aeronautics Act of 1938", Act of June 23, 1938, c.601, 52 Stat. 977, 992 Title IV §403(b), 49 U. S. C. §483(b). Defendant further denies every allegation of said complaint wherein 49 U. S. C. §1373 is referred to insofar as any right, duty, act or occurrence is alleged to be predicated thereon.

2. Denies the allegation of paragraph 5 that upon receipt of shipments, "airbills", or any other instruments in writing, were delivered to defendant.

3. Denies each and every allegation of paragraph 7 of said complaint.

4. Denies each and every allegation of paragraph 8 of said complaint set forth in the third sub-paragraph thereof at lines 20 to 30, inclusive, of page 3 of said complaint, except the allegation that defendant has paid to plaintiff the sum of \$16,085.76.

Answer to Second Count

1. Defendant repeats and realleges the denials and allegation of paragraphs 1 to 4 inclusive of the answer to the first count above set forth.

2. Defendant does not have sufficient information or belief to enable it to answer the allegations of paragraph 2 of plaintiff's second count and, placing its denial upon that ground, denies generally and specifically each and every allegation of said paragraph.

3. Denies generally and specifically each and every allegation of paragraph 3 of said second count.

For affirmative defenses to plaintiff's complaint and to each count thereof, defendant alleges as follows:

First Affirmative Defense

1. Plaintiff's complaint and each count thereof fails to state a claim upon which relief may be granted.

Second Affirmative Defense

2. In or about December, 1954, and January, 1955, agents and employees of plaintiff solicited defendant to utilize the services of plaintiff as a "consolidated carrier" or freight forwarder of freight by air. At said times plaintiff advised defendant that plaintiff's charges for the carriage of defendant's goods were substantially less than those of similar carriers.

3. At and prior to said times, defendant utilized the services of other carriers at a cost in excess of the charges quoted by plaintiff. At said time, defendant could have obtained the services of other carriers at a lesser cost to it than the total charges now claimed by plaintiff. Defendant accepted plaintiff's proposals and utilized the services of plaintiff herein for a period of approximately two years, commencing in January, 1955, in reliance on said quoted rate, and adjusted the prices of its services in reliance thereon, and has sub-

stantially changed its position in reliance on said representation.

4. Should plaintiff recover the additional charges herein claimed, defendant will suffer great and unjust financial loss, which it cannot recoup from its past customers, and plaintiff is estopped to recover such additional charges.

5. Plaintiff is an indirect air carrier within the meaning of the act of June 23, 1938, c.601, Title I, §1, 52 Stat. 977, 49 U. S. C. §401 (2).

Third Affirmative Defense

1. Defendant repeats and realleges paragraphs 1 to 5 of its second affirmative defense.

2. Defendant has not utilized plaintiff's services since February, 1957, and all amounts claimed by plaintiff were purportedly incurred prior to said time, and by reason of the extended delay by plaintiff in asserting its purported claims, and the damage to defendant above alleged which resulted from said delay, plaintiff's purported claim against defendant is barred by plaintiff's laches.

Fourth Affirmative Defense

1. Defendant repeats and realleges paragraphs 1 to 5 of its second affirmative defense.

2. Plaintiff as the publisher of the applicable tariffs determining the proper and lawful charges for the carriage of defendant's goods knew, or in the exercise of reasonable care should have known, the proper and lawful charges for the carriage of defendant's goods, and misrepresented the amount of such charges to de-

defendant with the intent that defendant should rely on said misrepresentations, and is precluded by its fraud from recovering the purported additional charges.

Fifth Affirmative Defense

1. Any contracts which existed between plaintiff and defendant were made in the State of California, and each of the shipments made by plaintiff for defendant was made pursuant to a separate agreement between the parties.

2. Each of the purported claims for relief set forth in plaintiff's complaint is barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of the State of California in that no part of the claimed obligations of defendant were founded upon an instrument in writing and all transactions between plaintiff and defendant, upon which said claims for relief are based, occurred more than two years prior to the commencement of this action.

Sixth Affirmative Defense

1. Any contracts which existed between plaintiff and defendant was made in the State of California, and each of the shipments made by plaintiff for defendant was made pursuant to a separate agreement between the parties.

2. The purported claims set forth in plaintiff's complaint insofar as they relate to a contract or contracts antedating December 15, 1955, are barred by the provisions of Subdivisions 1 or 2, or both, of Section 337 of the Code of Civil Procedure of the State of California, in that such transactions occurred more than four years prior to the commencement of this action.

Wherefore, defendant prays judgment that plaintiff take nothing by its complaint, for defendant's costs of suit, and for such other and further relief as the Court may deem just.

DUNLAP, HOLMES, ROSS & WOODSON
/s/ By PHILLIP S. LYDDON

Demand For Jury

Defendant respectfully presents its demand for a trial by jury.

DUNLAP, HOLMES, ROSS & WOODSON
/s/ By PHILLIP S. LYDDON

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 7, 1960.

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE PLEADINGS AND SUMMARY JUDGMENT, STATEMENT—POINTS AND AUTHORITIES, AFFIDAVIT OF HARMON, ADMITTED FACTS, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND JUDGMENT

To Plaintiff CMAX, Inc. and Its Attorneys Phil Jacobson and H. J. Bischoff:

You, and Each of You, Please Take Notice that defendant, by its attorneys Dunlap, Holmes Ross & Woodson, will move the above-named Court at Court Room 1, United States Post Office and Court House

Building, 312 North Spring Street, Los Angeles, California, on the 11th day of April, 1960, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for Judgment on the Pleadings on defendant's Fifth Affirmative Defense, or in the alternative for Summary Judgment, in favor of defendant herein as to the entire complaint and claim of plaintiff for relief, and as to each count thereof. Said motions shall be made pursuant to Rules 12 (c) and 56 (b) of the Federal Rules of Civil Procedure, upon the ground that there is no genuine issue as to any material fact in that plaintiff's entire claim for relief is barred by Subdivision 1 of California Code of Civil Procedure §339, that there is not and as a matter of law cannot be any open account between plaintiff and defendant, and that defendant is entitled to judgment as a matter of law. Said motion will be based upon this notice, the Statement-Memorandum of Points and Authorities, affidavit, and Request for Admission of Facts attached hereto, and all of the papers and files in the above entitled action.

Dated: This 1st day of April, 1960.

DUNLAP, HOLMES, ROSS & WOODSON,

/s/ By PHILLIP S. LYDDON,

Attorneys for defendant Drewry
Photocolor Corporation.

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN HARMAN

State of California, County of Los Angeles—ss.

John Harman, being first duly sworn, deposes and states as follows:

He is an adult and is in all ways competent to testify in the above action.

He is an officer, to wit, Vice President, of Drewry Photocolor Corporation, and has been such at all times since January 1946. He is responsible for the shipment of said defendant's goods, i.e., photographic film, film and photographs both to and from said corporation's Glendale, California plant, and has been either in charge of such shipment or personally concerned therewith since January 1946.

On or about December, 1955, representatives of CMAX solicited Drewry Photocolor Corporation for the shipment of Drewry's goods via said CMAX, a common carrier. Because of representations as to price and service made by CMAX, Drewry shipped certain of its products via CMAX. CMAX represented and agreed to deliver incoming goods in the morning of each business day and pick up outgoing goods in the evening of each such day. Pursuant to said agreement CMAX furnished Drewry Photocolor Corporation a "pad" of documents denominated "Airbills".

For each outgoing shipment, one set of such documents (consisting of several duplicates) was removed from the pad and the name and address of Drewry Photocolor Corporation was entered as consignor, and the name and address of the consignee and a description of the goods shipped were entered. All of said

entries were made by Drewry Photocolor Corporation. At the time each shipment was picked up, one copy of said document was retained by Drewry Photocolor Corporation and signed by an employee of CMAX. The remaining copies were given to the CMAX employee picking up the shipment.

The weight, rate classification and charge for each such shipment was thereafter determined by CMAX and entered upon the original of said document, except that in some cases, only the purported charge was so entered.

Said originals, as so completed, were returned by CMAX to Drewry Photocolor Corporation approximately weekly, accompanied by a bill for all shipments during said period. Drewry Photocolor Corporation then currently paid each such bill so rendered.

As of March 15, 1957, all of said charges as set forth in said bills had been paid, with the exception of \$110.00, which was disputed by Drewry on the ground of faulty performance or non-performance by CMAX. Said \$110.00 was and is the total of purported charges for special services which Drewry Photocolor Corporation contended were in some cases not ordered and in others not performed.

Further affiant sayeth not.

Dated this 1st day of April, 1960.

/s/ JOHN HARMAN.

Subscribed and sworn to before me this 1st day of April, 1960.

[Seal]

/s/ ORA T. YOST

Notary Public in and for said County and State.
My Commission expires April 1, 1960.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION OF FACTS

Defendant Drewry Photocolor Corporation, pursuant to Federal Rules of Civil Procedure, Rule 36, requests plaintiff CMAX within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at any appropriate time and place:

That each of the following statement is true.

1. That within seven business days after each of the shipments referred to in paragraphs five and eight of the complaint in the above-entitled action, plaintiff CMAX entered upon the original of the written instruments, alleged in paragraph five of said complaint, figures purporting to be the correct charges for such shipment according to the agreement of plaintiff and defendant herein, and within said seven days transmitted said original instrument to defendant Drewry Photocolor Corporation together with a statement or bill for an amount of money equal to the total of such purported charges within each seven days during the period from January 1955 to and including February 1957 with the exception of the month of February 1955. Upon receipt of said statement or bill, defendant Drewry Photocolor Corporation paid the purported charges

shown thereon within the seven days next succeeding the receipt of said bill.

2. That prior to December 1, 1957, all of the purported charges as set forth in statement "1" above had been paid by defendant Drewry Photocolor Corporation to plaintiff CMAX.

3. That the above-entitled action is based upon an alleged claim by plaintiff against defendant for an amount of money equal to the difference between the amount of money paid by defendant to plaintiff as set forth in statement "1" above and an amount of money alleged in plaintiff's complaint herein, in paragraph sixth thereof, to be the total of the lawful charges for the shipments therein alleged according to the allegedly applicable tariffs published by plaintiff pursuant to the Civil Aeronautics Act of 1938, together with interest on said money.

Dated this 19th day of February, 1960.

DUNLAP, HOLMES, ROSS & WOODSON,

/s/ By: PHILLIP S. LYDDON.

[Title of District Court and Cause.]

ANSWER TO REQUEST OF DEFENDANT FOR
ADMISSION OF FACTS DATED FEBRU-
ARY 19th, 1960

State of California, County of Los Angeles—ss.

Ben Fullman, being first duly sworn, deposes and says: That he is familiar with the billing and collection of accounts of plaintiff herein including the account of plaintiff herein.

Plaintiff admits as true statement No. 1 except that the word "usually" should be inserted between the words "Corporation" and "paid" on line 8 page 2.

Plaintiff admits as true statement No. 2 except that the words "except a balance of \$110.00 remains unpaid" should be added at the end thereof.

Plaintiff admits as true statement No. 3 except that the word "sixth" in line 21 page 2 should be "eighth".

BEN FULLMAN

Subscribed and sworn to before me this 2nd day of March, 1960.

ELSIE L. BRADY

Notary Public in and for said County and State.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW, AND JUDGMENT

The above-entitled cause came on regularly for hearing of defendant's motion for summary judgment on the day of , 1960, before the above-named Court, Honorable Pierson M. Hall, Judge, presiding, plaintiff appearing by its attorneys, Phil Jacobson and H. J. Bischoff by H. J. Bischoff, Esq., and defendant appearing by its attorneys, Dunlap, Holmes, Ross and Woodson by Phillip S. Lyddon, Esq., and the motion papers and reply thereto having been considered by the Court, and the Court having heard the argument of counsel for the respective parties, and the matter having been regularly submitted to the Court for decision and judgment, and the Court being now fully advised in the premises makes its findings of fact and draws its conclusions of law, as follows, to wit:

Findings of Fact

1. Plaintiff and defendant are corporations organized and existing under and by virtue of the laws of the State of California. Plaintiff is an indirect air carrier within the meaning of the Civil Aeronautics Act of 1938, Act of June 23, 1938, C.601, 52 Stat. 977.

2. That during the period from and including January 1955 to and including February 1957, plaintiff transported certain goods and materials for and at the request of defendant, pursuant to agreements by the parties as to each such shipment providing for the payment of charges for said services to plaintiff.

3. That defendant paid to plaintiff all of the charges pursuant to the above-mentioned agreements for said transportation, at a time more than two years prior to the filing of this action.

4. That the agreements between plaintiff and defendant for the transportation of goods were made in the State of California, and each shipment was made pursuant to a separate such agreement.

5. That plaintiff's claim for relief is not predicated directly upon any instrument or instruments in writing.

Conclusions of Law

1. That the above-mentioned claim for relief is subject to the law of the State of California pertaining to limitation of actions, and is barred by the provisions of California Code of Civil Procedure, Section 339, Subdivision (1).

2. That Defendant is entitled to judgment; that plaintiff takes nothing by his action, and for defendant's costs.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is

Ordered, Adjudged and Decreed that defendant have judgment against plaintiff; that plaintiff take nothing by its action.

Dated: This day of , 1960.

Pierson M. Hall, Judge United
States District Court.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 1, 1960.

[Title of District Court and Cause.]

AFFIDAVIT OF ELLIOT S. FULLMAN

Statement of California, County of Los Angeles—ss.

Elliot S. Fullman being first duly sworn deposes and says: That he is Secretary of CMAX, Inc., and has the custody of the accounting records of CMAX, Inc. That the accounts receivable ledger consists of card board paper kept in ledger container on which CMAX, Inc., posts the debits and credits of its customers. A photostat sample copy of such ledger card is attached to this affidavit and made a part hereof marked Exhibit "A". That CMAX, Inc., in its regular course of business, posted balances after each entry of additional charges and each entry of credits. That balance due statements were sent to Drewry Photocolor, 559 W. Colorado Blvd., Glendale, California from time to time. Upon receipt of payment of such statements, the amount received was entered on the ledger as a credit to the account of said Drewry Photocolor. That such statement consisted of a form of statement in words and figures shown in Exhibit "B" attached hereto and made a part hereof. That CMAX, Inc., retained a carbon copy of the entries made on said Exhibit "B" for its records all as shown on Exhibit "C" attached hereto and made a part hereof.

That a tabulation of posted balances from the accounts receivable ledger and posted receipts are as shown in Exhibit "D" attached hereto and made a part hereof.

That the tabulation consists of the following transactions: Book balances, statements rendered for balance due, and credits including dates of each transaction and amounts involved. The last entry was on the 14th day of November 1955.

/s/ ELLIOT S. FULLMAN

Subscribed and sworn to before me this 8th day of April, 1960

[Seal] /s/ ELSIE L. BRADY

Notary Public in and for the County of Los Angeles, State of California. My Commission expires January 17, 1964.

Exhibits A, B, C and D follow on pages 23-28.

[Endorsed]: Filed April 11, 1960.

EXHIBIT A

CMAA

CMAA

ACCOUNTS RECEIVABLE
LEGER

A

NAME Drewry Photocolor
559 W. Colorado Blvd.
ADDRESS Glendale, Calif.

CR. RATING _____

CR. LIMIT _____

SHEET NO. _____

WEST COAST STA. & PTO. CO. FORM S-501-28

DATE	INVOICE NO.	CHARGES	CREDITS	BALANCE
1957			BALANCE FORWARD	\$113.79
JAN 8	BL 551.81	Z 6.65 ✓		120.44**
JAN 14	551.82	Z 7.33 ✓		127.77**
JAN 16	BL 551.83	Z 6.60 ✓		134.37**
JAN 21		RA 443	98.73 -	35.64**
JAN 18	BL 551.84	Z 8.32 ✓		43.96**
JAN 22	BL 551.85	Z 6.14 ✓		50.10**
JAN 28	BL 551.86	Z 6.20 ✓		56.30**
JAN 30	BL 551.87	Z 6.66 ✓		62.96**
FEB 1	BL 551.88	Z 8.33 ✓		71.29**
FEB 13		RA 447	271.29 -	.00**
APR 22	BL 551.90	6.27		6.27**
APR 25	BL 551.91	24.74		31.01**
APR 26	BL 551.92	24.04		55.05**
APR 29	BL 551.93	24.67		79.72**
APR 30	BL 551.94	23.86		103.58**
MAY 1	BL 551.95	21.44		125.02**
MAY 2	BL 551.97	23.17		148.19**
MAY 3	BL 551.96	20.87		
MAY 3	BL 551.98	21.39		190.45**
MAY 6	BL 551.99	25.99		216.44**
MAY 7	BL 552.00	21.27		237.71**
MAY 7	BL 552.01	25.99		263.70**
MAY 9	BL 552.02	15.79		
MAY 9	BL 552.03	19.45	6-6-57	298.94**
MAY 21			26153.70 -	145.24**
JUN 6		RA 659	35.24 - ✓	110.00**
JUL 17	BL 552.10	12.18 ✓	7-23-57	122.18**
JUL 23	RA 725		12.18 - ✓	110.00**
DUN & BROS. STRE.				

This account receivable is not intended to be
assigned to the State of California and is
not to be included in the assets of the State of California.
It is subject to the provisions of the California
Uniform Gifts to Minors Act (C.G.M.A.), Chapter 105, Section 5.

EXHIBIT B

CITY MESSENGER AIR EXPRESS

NATIONWIDE AIR FREIGHT SERVICE

AIR FREIGHT STATEMENT

Remit to: CITY MESSENGER AIR EXPRESS
 1414 COLE PLACE, LOS ANGELES 28, CALIF.
 Phone: HOLLYWOOD 4-1180

ACCOUNT NO.

CMAX

SEPT. 26, 1955

DREWRY PHOTOCOLOR CORP.
 550 WEST COLORADO
 GLENDALE, CALIFORNIA

EXHIBIT B

These charges are due within seven days.

Return duplicate statement with remittance to insure proper credit.

CLOSING DATE	PREVIOUS BALANCE	AIRBILL NUMBER	CHARGES	AMOUNT
				TOTAL BALANCE DUE
	\$339.45			
9/17		LAX 09671	\$11.85	\$520.67
9/21		LAX 01946	13.87	
9/19		LAX 01950	11.47	
9/20		LAX 09673	11.77	
9/19		LAX 01951	9.08	
		LAX 01947	15.89	
9/20		LAX 01923	5.80	
9/20		LAX 01949	19.34	
		LAX 01952	13.41	
9/20		LAX 01955	10.97	
9/21		LAX 01954	8.80	
9/21		LAX 09674	11.12	
		LAX 01953	8.70	
		LAX 09675	10.80	
		LAX 01948	18.41	

EXHIBIT C

DREWRY PHOTOCOLOR CORP.
 550 WEST COLORADO
 GLENDALE, CALIFORNIA

SEPT. 26, 1955

	\$339.45			
9/17		LAX 09671	\$11.85	\$520.67
9/21		LAX 01946	13.87	
9/19		LAX 01950	11.47	
9/20		LAX 09673	11.77	
9/19		LAX 01951	9.08	
		LAX 01947	15.89	
9/20		LAX 01923	5.80	
9/20		LAX 01949	19.34	
		LAX 01952	13.41	
9/20		LAX 01955	10.97	
9/21		LAX 01954	8.80	
9/21		LAX 09674	11.12	
		LAX 01953	8.70	
		LAX 09675	10.80	
		LAX 01948	18.41	

EXHIBIT D

Date	Transaction	Amount
5-12-55	Book Balance	\$ 200.67
5-19-55	Book Balance	251.65
5-19-55	Statement rendered for balance due	251.65
5-19-55	Credit - F/B 00408 charged twice	8.63
5-19-55	Book Balance	243.02
5-20-55	Paid by check	251.65
5-20-55	Book Balance - credit	8.63
5-23-55	Book Balance	125.53
5-23-55	Statement rendered for balance due	125.53
5-23-55	Book Balance	254.68
5-23-55	Statement rendered for balance due	254.68
5-26-55	Paid by check	125.53
5-26-55	Book Balance	129.15
5-28-55	Paid by check	129.15
5-28-55	Book Balance	-0-
5-31-55	Book Balance	195.77
5-31-55	Statement rendered for balance due	195.77
5-31-55	Book Balance	236.69
5-31-55	Statement rendered for balance due	236.69
6-6-55	Book Balance	455.81
6-6-55	Statement rendered for balance due	455.81
6-9-55	Paid by check	236.69
6-9-55	Book Balance	219.12
6-10-55	Paid by check	219.12
6-10-55	Book Balance	-0-
6-13-55	Book Balance	245.19
6-13-55	Book Balance	342.29
6-13-55	Statement rendered for balance due	342.29
6-18-55	Book Balance	565.24
6-18-55	Statement rendered for balance due	565.24
6-20-55	Book Balance	620.01
6-20-55	Statement rendered for balance due	620.01

Date	Transaction	Amount
6-22-55	Paid by check	\$ 342.29
6-22-55	Book Balance	277.72
6-28-55	Paid by check	277.72
6-28-55	Book Balance	-0-
6-27-55	Book Balance	251.15
6-27-55	Book Balance	327.05
6-27-55	Statement rendered for balance due	327.05
7-5-55	Book Balance	545.73
7-5-55	Statement rendered for balance due	545.73
7-5-55	Book Balance	626.97
7-5-55	Statement rendered for balance due	626.97
7-7-55	Paid by check	327.05
7-7-55	Book Balance	299.92
7-9-55	Paid by check	299.92
7-9-55	Book Balance	-0-
7-11-55	Book Balance	182.78
7-11-55	Book Balance	231.52
7-11-55	Statement	231.52
7-14-55	Paid by check	231.52
7-14-55	Book Balance	-0-
7-18-55	Book Balance	270.65
7-18-55	Statement rendered for balance due	270.65
7-18-55	Book Balance	342.86
	(Book shows correction)	350.38
7-18-55	Statement rendered for balance due	342.86
7-25-55	Book Balance	598.46
7-25-55	Statement rendered for balance due	598.46
7-25-55	Book Balance	660.60
7-25-55	Statement rendered for balance due	660.60
7-23-55	Paid by check	350.38
7-23-55	Book Balance	310.22
7-28-55	Paid by check	310.22
7-28-55	Book Balance	-0-
7-31-55	Book Balance	319.25



Date	Transaction	Amount
7-31-55	Statement rendered for balance due	\$ 319.25
8-9-55	Paid by check	319.25
8-9-55	Book Balance	-0-
8-8-55	Book Balance	257.41
8-8-55	Statement rendered for balance due	257.41
8-8-55	Book Balance	339.33
8-9-55	Statement rendered for balance due	81.92
8-15-55	Book Balance	629.76
8-20-55	Book Balance	955.73
8-22-55	Statement rendered for balance due	326.03
8-16-55	Paid by check	339.33
8-16-55	Book Balance	616.40
8-27-55	Book Balance	982.78
9-6-55	Statement rendered for balance due	27.0
9-6-55	Book Balance	1009.88
9-6-55	Statement rendered for balance due	1009.88
9-6-55	Book Balance	1311.93
(8-25-55	Paid by check	616.40
(8-25-55	Book Balance	695.53
9-12-55	Book Balance	895.54
9-12-55	Statement rendered for balance due	37.49
9-12-55	Statement rendered for balance due	162.52
9-12-55	Credit C 68	366.38
9-12-55	Book Balance	529.16
9-12-55	Credit C 68	329.15
9-12-55	Book Balance	200.01
9-16-55	Credit C 69	200.01
9-16-55	Book Balance	-0-
9-19-55	Book Balance	102.14
9-19-55	Statement rendered for balance due	102.14
9-26-55	Book Balance	339.45
9-27-55	Book Balance	520.67
9-27-55	Statement rendered for balance due	520.67

Date	Transaction	Amount
9-27-55	Credit C 74	339.45
9-27-55	Book Balance	181.22
10-3-55	Book Balance	483.32
10-10-55	Book Balance	535.45
10-10-55	Book Balance	746.52
10-10-55	Statement rendered for balance due	746.52
10-11-55	Credit	483.32
10-11-55	Book Balance	263.20
10-17-55	Credit C 83	263.20
10-17-55	Book Balance	-0-
10-15-55	Book Balance	266.38
10-15-55	Statement rendered for balance due	266.38
10-26-55	Credit C 88	266.38
10-26-55	Book Balance	266.38
10-29-55	Book Balance	59.91
10-29-55	Book Balance	234.34
10-29-55	Statement rendered for balance due	234.34
11-4-55	Credit C 91	234.34
11-4-55	Book Balance	-0-
10-31-55	Book Balance	147.75
10-31-55	Statement rendered for balance due	147.75
10-31-55	Book Balance	186.36
10-31-55	Book Balance	238.47
10-31-55	Statement rendered for balance due	238.47
11-7-55	Book Balance	448.57
11-10-55	Credit C 93	248.15
11-10-55	Book Balance	200.42
11-14-55	Statement rendered for balance due	238.95
11-14-55	Book Balance	309.21
11-14-55	Statement rendered for balance due	309.21

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff and defendant have each filed a motion for summary judgment, as to both causes of action.

The briefs, arguments and affidavits of the parties are interesting and enlightening, but they serve to point up the proposition that from them and the pleadings and admissions on file, there is serious factual dispute between the parties as to the first cause of action, so that it cannot be said that "there is no genuine issue as to any material fact," either as to the allegations of the first cause of action in the Complaint, or as to the special defenses raised by defendant in its answer.

The motions of both parties for summary judgment, insofar as they go to the first cause of action, will be denied.

As to the second cause of action on open book account, defendants also made a motion for judgment on the pleadings. Excluding all matters in the file outside the pleadings, it is alleged in the Complaint, and not denied in the answer, that the last shipments made by plaintiff for defendant were in February, 1957. It is alleged in the Second Count of Plaintiff's Complaint that "at all times herein mentioned," i.e., as the transactions of shipments occurred, "Plaintiff entered in its books of account its charges as shown on air bills issued by it." Plaintiff seeks to recover more than \$12,000.00 not shown on those "air bills

issued by it," and alleges that the undercharges of more than \$12,000.00 were not entered in its books of account until at least August, 1959—two years and seven months after it had entered in its books the charges shown on air bills issued by it to the defendant.

Such conduct does not amount to an open book account under the terms of the California Statute (Code of Civil Procedure §337a). See *Costello v. Bank of America* (9 Cir. 1957) 246 F. 2d 807, and *Groom v. Holm* (1959) 176 C. A. 2d 310.

Defendant's motion for judgment of dismissal on the pleadings as to plaintiff's second cause of action will be granted upon presentation of the proper form of judgment under the Rules.

That being so, the motions for both parties for summary judgment on plaintiff's second cause of action are moot, and on that ground are denied.

Counsel will prepare appropriate Orders consistent with this Memorandum, and serve the same under the Rules.

The Clerk will set the matter down for pre-trial on February 27, 1961, and the parties in the meanwhile will comply with the Local Rules in connection with pre-trial.

Dated: December 28, 1960.

/s/ PEIRSON M. HALL
United States District Judge

[Endorsed]: Filed Dec. 29, 1960.

United States District Court for Southern District
of California Central Division

No. 1299-59-PH

CMAX, INC., also d.b.a. CITY MESSENGER OF
HOLLYWOOD and CITY MESSENGER AIR
EXPRESS,

Plaintiff,

vs.

DREWRY PHOTOCOLOR CORPORATION, a cor-
poration,

Defendant.

JUDGMENT OF DISMISSAL OF SECOND
COUNT OF COMPLAINT

The complaint herein having pleaded, in the Second Count thereof, a cause of action based upon an alleged open book account between plaintiff and defendant; defendant having moved for judgment on the pleadings as to the entire complaint and as to each count thereof on the ground, inter alia, that the pleadings establish that there is not any open book account between the plaintiff and the defendant; and said motion having regularly come on to be heard by the Court, and having been argued and briefed by counsel, and the Court, being fully advised in the premises, having filed its Memorandum stating the facts and conclusions with regard to said issue;

Now, it is hereby

Ordered, that the motion of defendant for judgment on the pleadings is granted as to the Second Count

in the Complaint; that said Second Count is hereby dismissed; that the said motion is denied as to the First Count of the complaint; that there is no just reason for delay in rendering and entering this judgment; and that this judgment be forthwith entered.

Dated: 1/23 1961.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged Jan. 16, 1961. Filed and Entered Jan. 23, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that CMAX, Inc., also D.B.A.. City Messenger of Hollywood and City Messenger Air Express, plaintiff above named hereby Appeals to the United States Court of Appeals for the Ninth Circuit from the judgment dismissing the Second Count of the complaint and entering judgement in favor of defendant on January 23, 1961 pursuant to Rule 54(b) of Federal Rules of Civil Procedure.

Dated January 26, 1961.

PHIL JACOBSON
H. J. BISCHOFF
/s/ By H. J. BISCHOFF,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jan. 27, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

- 1 Names and Addresses of Attorneys
- 2 Complaint, filed 12/15/59
- 6 Answer, filed 1/7/60
- 12 Defendants' Motion for Judgment on the Pleadings and Summary Judgment, Statement of Points and Authorities, Affidavit of Harmon, Admitted Facts, and Proposed Findings of Fact and Conclusions of Law and Judgment, filed 4/1/60
- 32 Plaintiff's Reply to Defendants oral argument and Summary of Points and Authorities, filed 4/25/60
- 47 Affidavit of Elliot S. Fullman and exhibits attached thereto, filed 4/11/60
- 55 Memorandum of the Court, filed 12/29/60
- 57 Judgment of Dismissal of Second Count of Complaint, filed and entered 1/23/61
- 60 Notice of Appeal, filed 1/27/61

62 Designation of contents of record on appeal, filed
2/16/61

Stipulation for deletion of item from designation
of contents of record on appeal. 2/28/61.

Dated: March 3, 1961.

JOHN A. CHILDRESS, Clerk,
/s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 17298. United States Court of Appeals for the Ninth Circuit. CMAX, Inc., also D.B.A. City Messenger of Hollywood and City Messenger Air Express, Appellant, v. Drewry Photocolor Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 4, 1961.

Docketed: March 13, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 17298

CMAX, Inc., also d.b.a., CITY MESSENGER OF
HOLLYWOOD and CITY MESSENGER AIR
EXPRESS,

Appellant

vs.

DREWRY PHOTOCOLOR CORPORATION, a cor-
poration,

Respondent.

APPELLANT'S STATEMENT OF POINTS AND
DESIGNATION OF RECORD ON APPEAL.

Comes now Appellant herein and sets forth the following points on which it intends to rely on appeal.

1. The trial court erred in holding on Respondent's motion for summary judgment that Appellant did not set forth the valid claim in Count 2 of its complaint.

2. The trial court erred in rendering judgment dismissing Second Count of complaint.

3. Appellant designates the following documents contained in the transcript of record on appeal material to the consideration of the appeal as follows:

Complaint beginning at page 2.

Answer beginning at page 6.

Defendant's motion for judgment on the pleadings and summary judgment beginning at page 12.

Affidavit of Elliot S. Fullman and attached exhibit beginning on page 47.

Memorandum of the Court beginning on page 55.

Judgment of dismissal of second count of complaint beginning on page 57.

Notice of appeal beginning on page 60.

Statement of Point.

Plaintiff's reply to Defendant's oral argument beginning at page 72 has been deleted by stipulation by both parties.

Dated: March 16, 1961.

PHIL JACOBSON

H. J. BISCHOFF

/s/ H. J. BISCHOFF

Attorneys for Appellant

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Mar. 17, 1961. Frank H. Schmid,
Clerk.